

JUN 15 1976

IN THE  
**Supreme Court of the United States**  
OCTOBER 1975 TERM

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of  
Guy X. Witz, deceased,

*Plaintiff-Appellant,*

*against*

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON  
ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR,  
INC.,

*Defendants-Appellees,*

*and*

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O.  
SHERWOOD, as Executors of the Estate of Gertrude C.  
Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-  
SPEAR, INC.,

*Defendants.*

**NOTICE OF MOTION, AFFIDAVIT, BRIEF AND APPEN-  
DIX IN SUPPORT OF MOTION BY DEFENDANTS-  
APPELLEES TO DISMISS APPEAL BY  
PLAINTIFF-APPELLANT**

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**Notice of Motion to Dismiss Appeal by  
Plaintiff-Appellant.**

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER 1975 TERM

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No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of  
Guy X. Witz, deceased,

Plaintiff-Appellant,

*against*

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON  
ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR,  
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Defendants-Appellees,

*and*

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O.  
SHERWOOD, as Executors of the Estate of Gertrude C.  
Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-  
SPEAR, INC.,

Defendants.

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SIRS:

PLEASE TAKE NOTICE that, upon the order of the Court of Appeals of the State of New York, dated February 17, 1976, which *sua sponte* dismissed the appeal of the Plaintiff-Appellant to that Court from an order of reversal of the Appellate Division of the Supreme Court of the State of New York, dated February 25, 1975; upon the affidavit of Anthony J. McNulty and the Brief annexed hereto and upon all of the proceedings heretofore had herein, the undersigned will move the Supreme Court of the United

*Notice of Motion to Dismiss Appeal by Plaintiff-Appellant.*

States, at a Session thereof for the hearing of motions of this type, pursuant to Rule 16(1)(a) of the Revised Rules of said Court, for an order dismissing the appeal of the Plaintiff-Appellant to said Court on the ground that the Court is without jurisdiction to hear the appeal under Section 1257 of Title 28, USC or, in the alternative, for an order dismissing the appeal pursuant to Rule 16(1)(b) of said Rules on the ground that the constitutional question sought to be reviewed was never raised nor passed on by the Court of Appeals of the State of New York or for such other and further relief as to the Court may seem just and equitable in the premises.

Dated: New York, New York  
June 10, 1976

Yours, etc.,

BENJAMIN F. GELEMAN,  
Attorney for Defendants-Respondents,  
345 Adams Street  
Brooklyn, New York 11201  
Tel. (212) 643-3391

To:

JOHN G. NICHOLAS, Esq.,  
Attorney for Plaintiff-Appellant,  
37-11 Union Street  
Flushing, New York 11354

**Affidavit in Support of Motion.**

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

ANTHONY J. McNULTY, being duly sworn, deposes and says:

I am an attorney at law, duly admitted to practice before the Court of Appeals of the State of New York and the Supreme Court of the United States. I am counsel to the attorney for the Defendants-Appellees on the appeal by the Plaintiff-Appellant to this Court from the order of the Court of Appeals of the State of New York, dated February 17, 1976, and am familiar with the facts of the case and all of the proceedings heretofore had herein. I am submitting this affidavit in support of the motion by the Defendants-Appellees for an order dismissing said appeal on the ground that this Court is without jurisdiction to hear the same.

The motion is made pursuant to Section 1257 of Title 28, United States Code, and Rule 16(1)(a) and (b) of the Revised Rules of the Court.

The basis of the motion is that the order sought to be reviewed by this Court is, in fact, non-reviewable because it is not a final judgment or decree of the highest court of the State in which a decision could be had, as required by Section 1257 of Title 28, United States Code, and further that the constitutional question sought by the Plaintiff to be reviewed by this Court was never raised by her in the Court of Appeals nor passed on by that Court, which dismissed her appeal thereto "upon the ground that the order appealed from involves a question of pure discretion of the

*Affidavit in Support of Motion.*

type not reviewable by the Court of Appeals" (Order of Ct. of Ap., Appellees' Appendix, p. 13).

Sworn to before me this  
14th day of June, 1976

.....  
Anthony J. McNulty

ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 4509708  
Qualified in Delaware County  
Commission Expires March 30, 1977

IN THE  
**Supreme Court of the United States**

OCTOBER 1975 TERM

—————  
No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of  
Guy X. Witz, deceased,

*Plaintiff-Appellant,*

*against*

RENNER REALTY CORP., R. M. OLLINGER, INC., WATSON  
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INC.,

*Defendants-Appellees,*

*and*

ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O.  
SHERWOOD, as Executors of the Estate of Gertrude C.  
Sherwood, deceased, SARAH E. MORGAN and HELMSLEY-  
SPEAR, INC.,

*Defendants.*

—————  
**BRIEF OF DEFENDANTS-APPELLEES IN SUPPORT  
OF MOTION TO DISMISS APPEAL OF  
PLAINTIFF-APPELLANT**

—————  
**Statement**

This appeal herein purports to be taken by the Plaintiff-Administratrix, Lucille Witz, to this Court, pursuant to Section 1257 of Title 28, USC, from an order of the Court of Appeals of the State of New York, dated February 17,

1976, which *sua sponte* dismissed the Plaintiff's appeal to that Court from an order of reversal entered in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, on February 25, 1975, "upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Order of Court of Appeals sought to be reviewed). Although a portion of said order of the Court of Appeals is reproduced as "Appendix A" at the end of the Jurisdictional Statement of the Plaintiff on her appeal herein, the entire order, as it was transmitted by mail to the attorney for the Defendants-Appellees by the Clerk of the Court of Appeals on February 24, 1976, is reproduced on page 13 of the Appendix to Appellees' Brief on the instant motion. Since the Plaintiff has neglected to include as part of her Jurisdictional Statement the order of the Appellate Division from which her appeal to the Court of Appeals was dismissed, that order is also reproduced on pages 14 and 15 of Appellees' Appendix herein.

As stated in the affidavit of Anthony J. McNulty, annexed hereto, the motion of the Defendants-Appellees to dismiss the appeal of the Plaintiff to this Court is based on jurisdictional grounds.

### Facts

This is a wrongful death action commenced by the Plaintiff-Administratrix, Lucille Witz, by the service of a summons, without a complaint, on February 14, 1964, to recover damages for the death of her husband, the decedent, Guy X. Witz, allegedly resulting from personal injuries sustained by the decedent on February 17, 1962, when, as a subtenant of the lessee of the premises involved herein, he was trapped inside an elevator during a fire that occurred in the office building leased, managed and operated by the Defendants, Renner Realty Corp. and R. M. Ollinger, Inc. The complaint alleges that the elevator was serviced by

the Defendant, Turnbull Elevator, Inc., which succeeded to the interest and liabilities of the Defendant, Watson Elevator Company.

Despite repeated demands made by these Defendants in 1964, the year the action was commenced, for the service upon them of a complaint, no complaint was served by the Plaintiff on said Defendants until February 19, 1974, which was ten years after the action had been commenced and after the two-year wrongful death statute of limitations had run, whereupon it was rejected by the Defendants as untimely served.

The Plaintiff then moved at Special Term, Part I of the Supreme Court of the State of New York for an order directing the Defendants to accept service of the complaint and the Defendants cross-moved for a dismissal, pursuant to Section 3012(b) of the New York CPLR, on the ground that the complaint had not been served within twenty days of their demands therefor.

By orders made on June 26, 1974, and entered in the office of the Clerk of New York County on July 2, 1974, the Special Term denied the Defendants' cross-motion to dismiss and granted the Plaintiff's motion to compel them to accept service of the complaint, on the ground that Rule 3216 of the New York CPLR applied, which requires the Defendants to serve a 45-day notice as a condition precedent to the granting of any motion to dismiss for failure to prosecute and on the further ground that, since the statute of limitations had run against the action, "Dismissal of the action would result in the loss of whatever cause of action plaintiff may have against these defendants." In making these orders, however, the Special Term provided that \$100.00 costs be awarded to each attorney for the Defendants who appeared in opposition to the motion, "to be paid by plaintiff's attorney personally, in view of his perfidious, unexplained, gross neglect now brazenly compounded by his effrontery in attempting to fasten responsibility for

lack of prosecution on defendants' failure to move sooner to dismiss" (Order of Quinn, J., N.Y. Co. Sp. Ct., June 26, 1974).

The Defendants-Appellees, as Appellants, thereafter appealed to the Appellate Division of the Supreme Court, First Judicial Department, from said orders of the Special Term and by an order dated February 25, 1975, the Appellate Division reversed said orders, denied the Plaintiff's motion and granted the Defendants' cross-motion to dismiss, severing the Plaintiff's action as to them on the ground that the Special Term erred when it applied the 45-day notice rule of Rule 3216 of the New York CPLR, because "this provision" requiring the service of a 45-day notice, "does not apply until issue has been joined, subdivision b(1)," and that "No valid excuses are offered to explain the delay in serving the complaint over this extended period." (Opinion of App. Div., on which Order of Reversal of Feb. 25, 1975, was entered).

The Plaintiff thereafter appealed to the Court of Appeals of the State of New York from the order of reversal of the Appellate Division but the Court of Appeals, after briefs had been filed on said appeal, dismissed the appeal *sua sponte* by an order dated February 17, 1976, "upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Appendix to Appellees' Brief, p. 13).

The Plaintiff now seeks to appeal to this Court from the order of dismissal of her appeal by the Court of Appeals, pursuant to Section 1257 (2) of Title 28, United States Code.

## FIRST POINT

### The Order appealed from is not reviewable by this Court.

In her notice of Appeal the Plaintiff Administratrix appeals to this Court from an order of the Court of Appeals of the State of New York, "pursuant to Title 28, United States Code, Section 1257, subparagraph 2" (Appendix C to Ptf's Jurisdictional Statement), which reads:

#### § 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \*

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Although the Plaintiff states on pages 3 and 4 of her Jurisdictional Statement that this Court "has jurisdiction to review the judgment entered by the Court of Appeals of the State of New York in this case", as the Court will see when it examines the order sought to be reviewed herein, it is not even a judgment, much less a final judgment "rendered by the highest court" of New York State "in which a decision could be had", as required by Section 1257 of Title 28 of the United States Code. On the contrary, said order is one entered *sua sponte* by the Court of Appeals dismissing the Plaintiff's appeal to that Court from the order of reversal of the Appellate Division of the Supreme Court of the State of New York, First Department, "upon the ground that the order appealed from

involves a question of pure discretion of the type not reviewable by the Court of Appeals" (Appendix to Appellees' Br., p. 13).

It has always been the rule in New York, as it is in this Court on the denial of applications for a writ of certiorari, that an order of the Court of Appeals dismissing an appeal or denying a motion for leave to appeal is not a final judgment on the merits and should not be so viewed (*Matter of Merchant v. Mead-Morrison M. Co.*, 252 N.Y. 284, 297-298; See also: *United States v. Carver*, 260 U.S. 482, 490; *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919). This being so, it is submitted that the order of dismissal of the Court of Appeals is clearly not reviewable by this Court under Section 1257 of Title 28, United States Code, and the motion of the Defendants-Appellees to dismiss the Plaintiff's appeal from said order, pursuant to Rule 16(1)(a) of the Rules of this Court, should be granted on that ground.

## SECOND POINT

**The constitutional question raised by the Plaintiff on her appeal to this Court was never raised or passed on in this action by the Court of Appeals of the State of New York.**

In the event this Court grants the Defendants-Appellees' motion to dismiss the Plaintiff's appeal to this Court on the ground stated in the First Point of this Brief, this Point will, of course, become purely moot.

Rule 16(1)(b) of the Revised Rules of this Court provides:

"(b) The court will receive a motion to dismiss an appeal from a state court on the ground that . . . the federal question sought to be reviewed was not timely or properly raised, or expressly passed on."

On page 2 of her brief filed in the Court of Appeals before that Court *sua sponte* dismissed her appeal, the Plaintiff alleged that her appeal to that Court presented two questions, to wit:

- "1. Would the denial of Defendants-Respondents' motion to dismiss constitute an abuse of discretion by the Court?
2. Should Plaintiff-Appellant's motion to compel acceptance of the complaint be granted under all of the circumstances of this case?"

The Court of Appeals declined to review either of these questions because they involved a matter of discretion which it is beyond the power of that Court to review (*In re Cuzdey*, 37 N.Y. 2d 939, 940; *Murray v. City of New York*, 30 N.Y. 2d 113, 119).

It is submitted that it is difficult to understand how the Plaintiff on her appeal to this Court can now claim that it has jurisdiction to review a constitutional question, which was never passed on by the Court of Appeals and could not have been passed on by that Court because the Court itself, on its own motion, dismissed the appeal as being beyond its scope of review.

Furthermore, not once in the Plaintiff's brief filed in the Court of Appeals, prior to the dismissal of her appeal by that Court, nor in any of the briefs filed in the Appellate Division on the Defendants' appeal to that Court from the orders of the Special Term, was the issue of a violation of the 14th Amendment to the Constitution of the United States ever mentioned, so this issue could hardly have been passed on by the Court of Appeals, even if said Court had elected to hear the appeal, which it did not.

It will thus be seen that, from whatever angle the present appeal by the Plaintiff to this Court is viewed, it is clear beyond doubt that she has no right whatever to

take such an appeal. It is also respectfully submitted that her attempt to do so, which has prompted the necessity for making this motion, constitutes an inexcusable affront to the dignity of this Court and evinces a total lack of consideration by her or her attorney for the excess demands which are continually being placed on the Court.

### CONCLUSION

**The appeal by the Plaintiff to this Court should be dismissed, with costs.**

Dated: New York, New York, June 10, 1976.

Respectfully submitted,

BENJAMIN E. GELEMAN,  
*Attorney for Defendants-Appellees*

ANTHONY J. McNULTY  
*Of Counsel*  
30 East 42nd Street  
New York, New York 10017  
Tel. (212) 867-4590

## APPENDIX TO DEFENDANTS-APPELLEES' BRIEF

### Order of Court of Appeals.

STATE OF NEW YORK,  
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of February A. D. 1976

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

1 Mo. No. 145 SSD 3

Lucille Witz, Administratrix of the Estate of  
Guy X. Witz, deceased,

Appellant,

vs.

Renner Realty Corp., et al.,

Respondents,

and Elizabeth S. Callargy, et al.,

Defendants.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals.

JOSEPH W. BELLACOSA  
Joseph W. Bellacosa  
Clerk of the Court

### Order of Appellate Division.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 25, 1975.

Present: HON. HAROLD A. STEVENS,

Justice Presiding,

THEODORE R. KUPFERMAN,

FRANCIS T. MURPHY, JR.,

MYLES J. LANE,

J. ROBERT LYNCH,

Justices.

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1903-04N

Lucille Witz, Administratrix of the Estate of  
Guy X. Witz, deceased,

Plaintiff-Respondent,

—against—

Renner Realty Corp., R. M. Ollinger, Inc., Watson Elevator  
Company, a corporation, Turnbull Elevator, Inc.,

Defendants-Appellants,

—and—

Elizabeth S. Callargy, et al.,

Defendants.

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An appeal having been taken to this Court by the defendants-appellants from two orders of the Supreme Court, New York County (Quinn, J.), entered on July 2, 1974, granting plaintiff's motion to compel defendants

### Order of Appellate Division.

to accept the complaint and denying defendants-appellants' motion to dismiss the action for failure to serve a complaint, and said appeal having been argued by Ms. Marilyn Scherer, of counsel for the appellants, and by Mr. Donald J. Werner, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same are reversed, on the law and in the exercise of discretion, without costs and without disbursements, plaintiff's motion denied, and defendants-appellants' motion to dismiss the action for failure to serve a complaint granted, and the action dismissed and severed as to defendants-appellants. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing and severing the action as to them.

ENTER:

Clerk.